

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**Investigation By The Department On Its Own
Motion Into Fitchburg Gas and Electric Light
Company's Dealings with Enermetrix**

D.T.E. 03-9

**INITIAL COMMENTS OF
FITCHBURG GAS AND ELECTRIC LIGHT COMPANY**

Fitchburg Gas and Electric Light Company ("FG&E" or "the Company") respectfully submits to the Department of Telecommunications and Energy (the "Department") the following preliminary comments concerning the Department's investigation into FG&E's transactions with Enermetrix, Inc. ("Enermetrix") between 2001 and 2002. As explained below, Enermetrix was not an affiliate of the Company under Massachusetts laws and regulations, and thus no violation of Massachusetts law occurred. Moreover, FG&E's use of Enermetrix to broker default service supplies produced a robust auction and significant benefits for its customers. FG&E is prepared to provide further evidence and witnesses on this issue in accordance with a procedural schedule as may be adopted by the Department.

BACKGROUND

1. Initiation of the Case

This investigation results from allegations made by the Attorney General in its brief in FG&E's last rate case, asserting that Enermetrix was an affiliate of FG&E and that FG&E improperly used Enermetrix to acquire default service wholesale supplies for its customers. D.T.E. 02-24/25, AG Initial Brief, pp. 78-79. The transactions in question

occurred in September 2001 and March 2002, when FG&E arranged for Enermetrix to broker its default service supplies, the results of which were subsequently approved by the Department. Enermetrix received fees of approximately \$19,000 for arranging competitive solicitation of suppliers to provide default service valued at approximately \$4 million.

2. Unitil's Investment in Enermetrix

Enermetrix was a software technology company and an energy markets facilitator founded in 1998 and initially headquartered in Maynard, Massachusetts. Enermetrix developed and operated the Enermetrix Exchange, an electronic, Internet-based marketplace for the purchase and sale of electricity and natural gas. At the time of the subject transactions, Enermetrix was being used by market participants, including 85 local distribution companies, in Massachusetts and 26 other states. The Enermetrix Exchange allowed retail users of energy to "post" their energy requirements on the Exchange, where suppliers could review and bid to supply these requirements. The Exchange was an easily accessible and transparent method for suppliers to receive information and to bid on transactions.

At the time FG&E used Enermetrix, Unitil Corp., FG&E's parent corporation, was one of approximately 30 investors in Enermetrix and held an 8.68% equity interest in Enermetrix.¹ Robert Schoenberger, Chairman and Chief Executive Officer of Unitil served on the Enermetrix Board, as one of 10 directors, during this time period. Unitil

¹ Other equity owners included Dusquesne Enterprises (17.24%) Insight Capital Partners III, L.P. (10.53%), John Gaus (10.31%), Jeff DeWeese (10.31%), G.E. Capital Equity Investments (7.74%), Cinergy Ventures, L.L.C. (4.46%), Aliant Energy Resources, Inc. (2.98%), and Enermetrix Employee Stock Option Plan (19.34%).

Corp. sold its interest in Enermetrix in April, 2002, at which time Mr. Schoenberger resigned from the Enermetrix Board.

In early April, 2002, Enermetrix was acquired by CES International, and moved its operations to Atlanta, Georgia. As part of this reorganization, Enermetrix significantly curtailed its operations in New England, including terminating the supplier member support group. Thereafter, Enermetrix was no longer a viable alternative for soliciting default service supplies in New England.

Unitil Resources, Inc. (URI), a Unitil affiliate, through its Usource subsidiary, held a buy-side seat on the Enermetrix Exchange to perform web-based retail energy brokering in the mid-Atlantic and Northeast. Usource does not broker wholesale supplies, such as default service. In DTE 01-54, the Department's investigation into competitive market initiatives, Unitil encouraged the Department to explore the benefits to Massachusetts utilities and ratepayers of using Usource to promote retail choice and customer access to competitive retail energy suppliers. Competitive Market Initiatives, D.T.E. 01-54, Comments of Unitil Corp., June 14, 2001. FG&E has never entered into any transactions with Usource.²

3. FG&E's Use of Enermetrix

In 2001, FG&E determined that the use of the Enermetrix' brokering services could provide it with a more effective means of accessing the competitive energy market to acquire default service supplies. The Enermetrix Exchange provided the opportunity for FG&E to access a broader range of suppliers because of Enermetrix' relationships

² Under the Department's restructuring order for FG&E, DTE 97-115/98-120, p. 12 (Jan. 15, 1999), FG&E and URI were allowed to use Unitil Service Corp. to provide management and administrative support, but URI was prohibited from doing business in FG&E's service territory.

with both wholesale and retail suppliers. FG&E's previous solicitations had produced a limited market response. FG&E used Enermetrix on two occasions to broker its six month default service procurements. The first solicitation was issued in September 2001 for wholesale energy service commencing in December 2001. The second solicitation was issued in March 2002 for wholesale energy service commencing in June 2002.

Both times that FG&E used Enermetrix, Enermetrix directly charged its broker fees to the successful suppliers. FG&E paid no brokering or other fees to Enermetrix for its services. The broker fees charged by Enermetrix to the default service suppliers for the September 2001 RFP were 0.0200 cents per kWh for all customers. The fees charged by Enermetrix to the default service suppliers for the March 2002 RFP were 0.0275 cents per kWh for the Residential and Small Commercial Customers and 0.0300 cents per kWh for the Medium and Large Commercial Customers. As a result, Enermetrix earned \$7,495 for the September 2001 RFP and \$11,631 for the March 2002 RFP, or a total of \$19,126 for both transactions.

In D.T.E. 99-60, FG&E's Default Service Tariff Filing (October 3, 2001 and April 9, 2002), the Department reviewed FG&E's default service RFPs using the Enermetrix Exchange and approved the resulting rates. The Department's records in D.T.E. 99-60 demonstrate that FG&E's default service solicitations using the Enermetrix Exchange produced robust auctions for FG&E, and the lowest or among the lowest default prices in the Commonwealth. In contrast, prior to use of the Enermetrix Exchange, FG&E's default prices were among the highest in the Commonwealth. See the Department's web site (www.state.ma.us/dpu), Electric Restructuring in Massachusetts, Monthly Default Service Prices for 1998-2001. After the first solicitation using

Enermetrix, FG&E obtained the lowest fixed prices for default service among all Massachusetts utilities, across all rate classes, during the first six months of 2002. Id. After the second solicitation using Enermetrix, FG&E achieved the second lowest residential fixed default rates for the last half of 2002. Id.

QUESTION NO. 1.

Whether Enermetrix is a company affiliated to FG&E within the meaning of M.G.L. c. 164, §85 and 220 C.M.R §12.02

RESPONSE

Unitil's 8.6% equity interest in Enermetrix did not make Enermetrix an affiliate of FG&E under either M.G.L. c. 164, §85 or 220 C.M.R. §12.02. Section 85 of chapter 164 provides three definitions of an "affiliate" of a company subject to the Department's jurisdiction, *e.g.*, FG&E. Subsection (a) of § 85 defines an "affiliate" as:

. . . [A]ny corporation, trust, association, partnership or individual

- (a) controlling a company subject to this chapter, either directly, by ownership of a majority of its voting stock or of such minority thereof as to give it substantial control of such company, or indirectly, by ownership of such a majority or minority of another corporation or association so controlling such company;

Unitil Corp. is an affiliate of FG&E under this definition, *i.e.*, Unitil controls FG&E directly by ownership of a majority of its voting stock. Enermetrix was *not* an affiliate of FG&E under subsection (a) because it did not control FG&E either directly through ownership of FG&E stock, or indirectly by ownership of Unitil stock.

Subsection (b) of §85 defines an "affiliate" as an entity:

- (b) so controlled by a corporation, society, trust, association, partnership or individual controlling as aforesaid, directly or indirectly, a company subject to this chapter;

All of the other Unitil subsidiaries, *e.g.*, Unitil Energy Systems, Inc., URI, Unitil Power Corp., are affiliates of FG&E under subpart (b) because they are 100% owned by Unitil, which owns and controls FG&E. However, under this subsection, Enermetrix was *not* an affiliate of FG&E because Unitil did not "so control" Enermetrix (*i.e.*, by majority stock ownership or by ownership of such a minority interest to amount to "substantial control").

Unitil Corp.'s ownership interest in Enermetrix of 8.68% cannot be deemed to constitute "substantial control" of Enermetrix. Unitil Corp. could not control Enermetrix, as it was one of a large number of equity investors, held only one Board seat, and had no extraordinary voting power. In Re Boston Edison Company, D.P.U./D.T.E. 97-63 (Apr. 17, 1998), the Department rejected the DOER's position that even the smallest level of investment in a regulated utility should be sufficient to confer affiliate status under §85. The Department clarified that "control" or absence of bargaining power is the threshold for affiliates, and stated that a threshold based upon a *de minimis* interest would distort the meaning of the statute.

Subsection (c) of Section 85 provides a third definition of an "affiliate":

- (c) [an entity] standing in such a relation to a company subject to this chapter that there is an absence of equal bargaining power between the corporation, society, trust, association, partnership or individual and the company so subject, in respect to their dealings and transactions.

There is no evidence that Enermetrix stood "in such a relation to" FG&E such that there was an "absence of equal bargaining power". Under the two transactions in question,

Enermetrix charged the default service suppliers its standard brokering fee. FG&E did not pay Enermetrix any consideration for the wholesale energy brokerage services provided in connection with procuring its default service supplies.

Finally, an "affiliate" under the Department's regulations is defined as "any unit or division within a Distribution company or its parent, or any separate legal entity, either owned or subject to common control of the Distribution company or its parent." 220 C.M.R. §12.02 (emphasis added). Enermetrix is not a "unit or division" of FG&E or "owned or subject to common control" of Unitil Corp. or FG&E. "Control" in 220 C.M.R. 12.02 should be interpreted consistent with the statutory language of §85(a) which defines control as "substantial". Less than 9% equity interest is not "substantial."

QUESTION NO. 2

If Enermetrix is an affiliated company, whether FG&E complied with the requirements of §§85A and 94B pertaining to contracts with affiliated companies.

RESPONSE

For the reasons explained in FG&E's Response to Questions No. 1, above, neither of these statutes is applicable as Enermetrix was not an affiliate of FG&E under G.L. c. 164, §85. Moreover, even if Enermetrix were an affiliate of FG&E, Section 94B is irrelevant because neither of FG&E's two wholesale energy brokering transactions with Enermetrix were for longer than 6 months, and the statute clearly applies to contracts "covering a period in excess of one year".

QUESTION NO. 3

If Enermetrix is an affiliated company, whether the pricing of its services to FG&E complied with the requirements of 220 CMR §12.04 pertaining to the pricing of transactions between a distribution company and an affiliated company.

RESPONSE

220 C.M.R. §12.04(3) provides: “An Affiliated Company may sell, lease or otherwise transfer an asset to Distribution Company, and may also provide services to a Distribution Company, provided that the price charged to the Distribution Company is no greater than the market value of the asset or service provided.” (emphasis added)

As explained in Response to No. 3, FG&E made no payments to Enermetrix. Enermetrix charged the wholesale energy suppliers for use of its services. The price paid to Enermetrix by the default service providers reflects a market price, because Enermetrix charged the suppliers the standard brokering fees it charged other suppliers using the Enermetrix Exchange.

QUESTION NO. 4

If Enermetrix is an affiliated company, whether FG&E, in procuring its default service supply through Enermetrix, obtained a market-based price for default service procured through reasonable business practices in compliance with the Department's directives in D.T.E. 99-60-A.

RESPONSE

In procuring its default services, FG&E complied with the standards established in DTE 99-60-A which provide: (1) Default service prices should be market-based, be procured through reasonable business practices, and take into account the costs of providing default service, consistent with the development of robust competitive retail markets; (2) costs associated with providing default service should be minimized; (3) customer confusion should be minimized; and (4) a general consistency in default service

across distribution service territories should be achieved, to the extent such consistency is feasible and would benefit ratepayers.

Through Enermetrix' brokerage service, FG&E was able to access a wide range of retail and wholesale suppliers in New England. FG&E achieved a robust market response to its Default Service Supply Solicitations in October 2001 and April 2002.³ The September, 2001 solicitation using Enermetrix produced more bidders than prior FG&E solicitations and extremely attractive prices. For the first time, the Enermetrix solicitation produced group differentiated pricing, signaling to FG&E that the wholesale market was paying more attention to the FG&E load than in the past.

Throughout the process, Enermetrix communicated to FG&E wholesale suppliers' concerns or questions and allowed FG&E to guide the process when necessary. The resulting default service price demonstrated reasonable business practices as required under the first prong of the Department's standard in DTE 99-60-A, because the price achieved by FG&E was among the lowest prices obtained during this period by comparable utilities.

QUESTION NO. 5

If FG&E is found to be in violation of the requirements concerning dealings with an affiliated company or the requirements for the pricing and procurement of default service, what penalty, if any, should be imposed.

RESPONSE

No penalties should be assessed against FG&E for conducting wholesale energy supply business through Enermetrix. Even if the Department determines that Enermetrix

³ As part of its effort to expand its access to the supply market, FG&E did not limit bidders to suppliers which were members of the Enermetrix Exchange. Potential suppliers could utilize the Enermetrix Exchange or make their bids through Enermetrix brokers.

is an affiliate under the applicable statutes and regulations, no penalties should be assessed because: (a) FG&E's interpretation of the law that Enermetrix was not an affiliate was reasonable and made in good faith; (b) FG&E notified the Department about its transactions with Enermetrix; (c) FG&E made no payments to Enermetrix for its services; (d) the price FG&E achieved for default service by using Enermetrix was "market-based" procured through reasonable business practices; and (e) not only were ratepayers not harmed by the Enermetrix arrangement, ratepayers benefited from some of the lowest default service rates in the region.

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